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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/680,968	10/07/2003	Georgia L. Zehner	18,493	6068
23556	7590	02/14/2006	EXAMINER	
KIMBERLY-CLARK WORLDWIDE, INC. 401 NORTH LAKE STREET NEENAH, WI 54956			COLE, ELIZABETH M	
			ART UNIT	PAPER NUMBER
			1771	

DATE MAILED: 02/14/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/680,968

Applicant(s)

ZEHNER ET AL.

Examiner

Elizabeth M. Cole

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

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1. Claims 1-31 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The specification as originally filed does not enable one skilled in the art to make the claimed invention because it does not disclose what is meant by activation, or how activation is achieved.

2. Claims 1-31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In independent claims 1 and 18, it is not clear what is meant by “activation”.

How is the liner material activated? Also, it is not clear what is meant by “adapted to”, in that the structural or other changes which adapt the liner are not set forth in the claim. Also, in claims 1 and 18, it is not clear what is meant by the limitation that the elastic is non-tensioned. Does this mean that the elastic is associated with the fluid permeable layer while it is in a non-tensioned state or does it mean that the elastic is never under tension, or does it refer to the state of the elastic before “activation”? Also in claims 1 and 18, it is not clear what the claimed extensibility is in reaction to, i.e., what force is applied to extend the liner composite at least 25%? In claims 2 and 21, it is not clear what is meant by the limitation “the three-dimensional configuration is a barrier element”. Does this mean that the configuration comprises a barrier element or that it forms a barrier element, and if it means it forms a barrier element, where is the barrier element in relation to the other portions of the absorbent article. In claims 4, and 13 it is not clear what is meant by “associated with and superposed on... to thereby form a periphery”. Does this mean that the size of the liner composite is the same as the size of the outer cover? In

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claim 6, , it is noted that neither claim 1 nor claim 5 recite a leg structure, so it is not clear where the leg portion of the absorbent article is in relation to the rest of the absorbent article. In claims 7 and 24, 26, it is not clear how the barrier element can be liquid impermeable since the barrier element is formed from the three-dimensional liner composite which is described as being fluid permeable. In claim 8, it is not clear what the barrier element is laterally oriented with regard to, in other words, what is the reference point which the barrier element is lateral to? In claim 9, it is not clear where the waist elastic is in relation to the claimed absorbent article. In claim 19, it is not clear how the barrier element can be liquid impermeable since it is formed by the liner composite which is taught as being permeable in claim 1. In claims 11 and 27, it is not clear what the structure of a fit element is. How does claim 11 further limit the independent claim? The structure of the fit element is not set forth, and the structure of the absorbent article comprising the fit element is not set forth. Claims 2-17, 19-31 rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential elements, such omission amounting to a gap between the elements. See MPEP § 2172.01. The omitted elements are: how the barrier element, leg elastic, leg, waist, waist band and fit elements are disposed in the structure of the absorbent article. The independent claims recite an impervious layer, (called the outer cover), the absorbent core and the permeable liner. The dependent claims state various elements , (i.e., barrier, leg cuff, waist band, fit element), that the liner composite "is", but do not set forth the actual structure of the absorbent article.

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-32 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-23 of copending Application No. 10/680.967. Although the conflicting claims are not identical, they are not patentably distinct from each other because each discloses a disposable absorbent article comprising a cover, a core and an elastic material-containing layer which retracts to form a three-dimensional configuration.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Coles, EP 650,714, alone or in the alternative, in view of Osborn III et al, U.S. Patent No. 6,287,288. Coles discloses an absorbent article which comprises a topsheet a back sheet and an absorbent core. The topsheet is permeable. The absorbent article has an elastic composite which can be

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attached to either the topsheet or the backsheet. The elastic composite is formed by attaching the elastic in a relaxed state, (which is equated to the claimed non-tensioned state) to another layer. See abstract. The elastic composite is then activated by stretching it to extend the other layer and activate the elastic layer. See col., 4, lines 14-26. The activated elastic composite then gathers the portions of the absorbent article to which it is attached, which corresponds to the claimed formation of the three dimensional configuration. See col. 4, lines 35-55. The elastic composite can be attached to leg portions, barrier cuffs or waist bands of the absorbent article. See col. 6, lines 9-24. While Coles does not disclose the retraction capability, since Coles teaches forming an elastic composite which can be applied to various regions of the absorbent article where elasticity is desired, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have selected the particular degree of elasticity and thus retraction capability desired in the finished article. With regard to the limitation that the other layer to which the elastic layer is bonded is extensible, it is noted the Coles discloses that the layer is generally inextensible and defines this as being able to extend 5% at a force of between 0.5 and 5 N/cm. The examiner is not able to determine whether this would anticipate the claimed degree of extensibility since the force applied is not set forth in the instant claims. Therefore, in the alternative, if the second layer of Coles is considered to be inextensible, Osborn teaches employing an extensible material as either the topsheet, the backsheet or both. See col. 14, lines 57-67. The extensible topsheet and/or backsheet enhances the comfort of the wearer of the absorbent article. Therefore, it would have been obvious to one of ordinary skill in the art to have employed an extensible topsheet or backsheet in the absorbent article of Coles, motivated by the expectation that this would enhance the comfort of the wearer of the absorbent article.

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The extensible topsheet would correspond to the claimed extensible, permeable liner material which is associated with the elastic material since the elastic composite of Coles can be bonded to regions to the topsheet of the absorbent article.

7. Applicant's arguments filed 12/2/05 have been fully considered but they are not persuasive.

8. With regard to activation, Applicant argues that activation is defined as the force which is applied when the absorbent article is donned. However, the instant claims do not recite any garment structure and therefore it is not clear how the article would be stretched or otherwise have force applied to it during use. Further, especially with regard to the 112 2nd rejection, the metes and bounds of the claim are not clear because it is not clear what degree of force would have to be applied to provide activation to the claimed composite material. With regard to the limitation "adapted to", Applicant argues that the sub parts labeled as (i) and (ii) make it clear that it is the interaction of the extensible liquid impermeable outer cover material and the non-tensioned elastic and the relationship of these materials that upon activation they will have a retraction capability differential of at least 10% and will attain a three dimensional configuration. However, this argument does not address how the components are adapted, i.e., how are they changed. The relationship between the two components is not an adaptation of the components, but rather sets forth their interaction. However, the claim recites that the two components are adapted to interact in a particular way upon activation, but does not set forth any structure as how the components are adapted. With regard to non-tensioned, applicant argues that non-tensioned refers to the elastic state before activation. However, this language is not present in the claims. With regard to the claimed extensibility, Applicant refers to the specification and the discussion

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of activation. However, while activation can be defined as the degree of stretching which would occur due to putting the absorbent material on, extensibility must be defined as the degree of extension in response to a particular force. The claims do not recite the degree of force applied, and therefore the claims are indefinite. With regard to claim 6, Applicant points to the specification. However, claim 6 recites a leg elastic but does not disclose any leg structure, so the claimed structure is not clear. Similarly, with regard to claim 8 and 9, Applicant points to the specification. However, while the claims are read in light of the specification, limitations are not read from the specification into the claims. A claim which recites the lateral centerline needs to have first positively recited a lateral centerline. A claim which refers to a waist elastic need to have recited that a waist is present. With regard to the fit element, again, while the claims are interpreted in light of the specification, the basic structure of the article being claimed needs to be set forth in the claim in order for the metes and bounds of the claim to be set forth and in order for the claim to be definite. With regard to the rejection omitting essential elements from the claims, the claims are required to particularly point out and distinctly claim the invention. To recite that the non-tensioned elastic is "associated" with the cover does not particularly point out and distinctly claim the invention because the structure being claimed is not clear. Therefore, the rejection is maintained.

9. With regard to the double patenting rejection, Applicant argues that '967 deals with a fluid impermeable liner composite. However, each application recites an outer layer an absorbent core and a inner layer. Since there are three layers where in the absorbent core is disposed in between the inner and outer layers, the structures are identical depending upon how the articles are oriented. Also, it is noted while Applicant presents arguments regarding how the

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articles are designed to rest against the skin, the instant claims do not recite any structure other than the three layers, these arguments are not persuasive. Therefore, the rejection is maintained.

10. With regard to the art rejection, Applicant argues that Coles clearly fails to teach or suggest an extensible liquid impermeable outer cover. However, Coles teaches that outer cover has an extensibility defined as being able to extend 5% at a force of between 0.5 and 5 N/cm. As set forth with regard to the 112 second paragraph rejections above, the extensibility of the claimed material is not clearly set forth. Therefore, the examiner is not able to determine whether the material of Coles would be considered extensible as the term is used in the instant claims. Since the material of Coles does extend 5% at a force of between 0.5-5 N/cm, it is clear that the material of Coles is not inextensible in an absolute sense. Therefore, the Coles structure does teach an extensible impermeable layer. Applicant argues that the instant claims require an extensibility of no less than 10%. However, the force which is applied to achieve the extensibility is not set forth. Further, the claims do not recite a particular level of extensibility. Therefore, the rejection is maintained.

11. With regard to the combination of Coles and Osborn, Applicant argues that the extensible layer of Osborn could not be substituted for the less extensible layer of Coles because Coles requires the less extensible layer to be permanently elongated so that pleats are formed. However, Coles merely requires that there be a difference in extensibility of the two layers so that the less extensible layer is extended so as to be permanently elongated. Therefore, the extensible layer of Osborn could be combined with the Coles structure in order to improve the comfort of the wearer of the absorbent article, while still maintaining the ability of the extensible layer to be extended to a degree that it is permanently extended in order to form pleats.

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12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

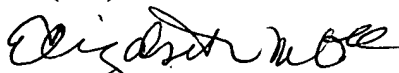
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (571) 272-1475. The examiner may be reached between 6:30 AM and 6:00 PM Monday through Wednesday, and 6:30 AM and 2 PM on Thursday.

Mr. Terrel Morris, the examiner's supervisor, may be reached at (571) 272-1478.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

The fax number for all official faxes is (703) 872-9306.



Elizabeth M. Cole
Primary Examiner
Art Unit 1771